Nos. 19227 and 19228

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19227

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

No. 19228

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PAUL BIAZEVICH, *et al.*, dba M. V. LIBERATOR, *et al.*,
Respondents.

RESPONDENTS' PETITION FOR REHEARING

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Respondents, by their counsel of record, respectfully urge that the Court grant a rehearing to reconsider portions of its opinion rendered on January 6, 1967, on the grounds that although the Court found the Trial Examiner and Board erred in depriving Respondents of

essential procedural rights, it adopted new and stringent standards, not urged by the Board, or by the Court during argument, and heretofore not supported by authority. Without at least a rehearing on the points raised herein, Respondents will be forever foreclosed from meeting the novel tests promulgated by the Court. It is respectfully submitted that the Board's decision was rendered upon an incomplete record, created by the Board's errors. The magnitude of the case, the twelve years of litigation, and the potential economic impact upon Respondents warrant a rehearing in the premises.

I

GROUNDS URGED FOR REHEARING

This Court has unfortunately and surprisingly reached conclusions that result in treating the series of procedural errors committed below in such a manner that the Board, and its employees, will have no hesitancy in the future in depriving other Respondents of their procedural rights, as long as such deprivation makes it impossible for the Respondents to meet the tests set forth in the instant case. Essential due process requires that certain procedural safeguards be observed to protect the basic right of fair hearing guaranteed by the Constitution of the United States, to say nothing of basic rules of fair play. Respondents respectfully request that the Court's following conclusions be reconsidered:

1. **That the order of the Board should be enforced without further hearing with respect to the alleged fact that certain statements of witnesses were either lost or destroyed in good faith.** (Opinion p. 5)

Because the Trial Examiner erroneously revoked subpoenas duces tecum and ad testificandum (discussed *infra*) there was no testimony by the Board employees or the attorneys for the general counsel with respect to the care or lack of care taken in preserving the statements, or in searching the stockpile of documents in the Board's possession. There is nothing in the record to explain the inability of the Board to produce the statements,[1] even though witnesses testified that they gave Board agents statements that were not produced. (TR. 4369, 4372, 4460, 4466, 4576, 4577, 4638, 4640, 4677, 4678, 4684, 4689, 4788, 4792, 4795, 4953.) If the Board or its employees were reckless or negligent with respect to preserving the documents certainly there can be no finding of good faith.

In *Killian v. United States,* 368 U.S. 231 (1961) the Supreme Court remanded the matter to the District Court for findings regarding the nature of the destruction and the availability of the documents. In *United States v. Tomaiolo,* 317 F.2d 324 (2d Cir. 1963), *cert. denied,* 375 U.S. 865 (1963) the government agent took notes, transcribed them, and made the transcription available to the defendant's counsel. There was specific evidence respecting the practice of the government agent to allow the court to make such a finding. No such evidence is available to this court in this matter.

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[1] *See, e.g.,* Tr. 4372, 4373 where O'Brien, attorney for the general counsel, said "I can only say that I do not have either a questionaire or a statement from this witness."

2. **That the attorneys for the general counsel were applying the proper test in determining which statements of their witnesses should be made available to Respondents.**

The court has apparently erroneously assumed (but not specifically found) that the attorney for the general counsel was applying a proper test when he selected which statements he would produce. At the reopened hearing the attorney for the general counsel represented to the Trial Examiner that he could not find additional *signed* statements of the witnesses (Tr. 4713, 4788, 5098, 5122), but when counsel for the boatowner respondents demanded notes and memoranda of Board agents taken at the time of interviews of witnesses, the attorney equivocated and said:

> "There are no such documents *authorized and ratified* by the witness, and therefore, I must respectfully decline to produce any of the notes described by Mr. Ogren." (Tr. 5099) (Emphasis Added)

As the Court has held, the statements need not have been "authorized" or "ratified" by the witnesses and Respondents were entitled to any substantially verbatim statements of witnesses in the Board's possession. (Opinion pp. 8, 9) Moreover there is a clear possibility that such documents were withheld by the Board. In light of the Court's requirement imposed upon Respondents regarding the proof of the prejudice sustained (discussed *infra*), Respondents certainly should be given an opportunity to examine the Board employees and attorney for the general counsel regarding the state-

ments that were not disclosed. *General Engineering v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965).

3. **That the failure of the Trial Examiner to personally examine the Filter memoranda to determine whether they were producible was not a sufficiently grave error to deny enforcement.** (Opinion p. 9)

The court cites *Harvey Aluminum, Inc. v. N.L.R.B.*, 335 F.2d 749 (9th Cir. 1964) for the proposition that if Respondents wished review of the Trial Examiner's determination as to the nature of the Filter memoranda we should have requested that they be submitted under seal to the court. In *Harvey Aluminum, supra,* the Trial Examiner examined the documents in question and made a determination which was subject to review. In the case at bar, however, no determination has yet been made by the Trial Examiner or the Board for this court to review. Certainly such a determination should be made by the trier of fact in the first instance, rather than the court of appeals. *General Engineering v. N.L.R.B.*, 341 F.2d 367 376 (9th Cir. 1965)

Moreover, this Court had an opportunity to examine at least a portion of the Filter notes during oral argument on this matter, and Chief Judge Barnes expressed shock and indignation when the Board attorney offered the notes to this Court at that late date. Certainly the reaction of Chief Judge Barnes at that time was the proper one, but now, after a lapse of more than one year since argument, the Court has reached a conclusion quite different, and expresses the feeling that the "obvious" prejudice which existed at the time of oral argument somehow was

diminished by the time the Court rendered its opinion. Respondents should not now be denied a remedy because the notes were not submitted to the court "under seal" when at least some of the notes were submitted by the Board and the court refused to examine them.

4. **That the Trial Examiner's revocation of subpoenas duces tecum and ad testificandum issued to the Board employees was not a sufficiently grave error to deny enforcement.** (Opinion p. 9)

This Court found in *General Engineering v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965) that there arose a need for further Board proceedings when the subpoenas issued to the Board employees were erroneously revoked. The case is certainly sufficient and controlling authority to require the same result here. The court, however, attempts to distinguish the cases on the basis of the offer of proof made by counsel for General Engineering in connection with the arguments against revocation of the subpoenas. However the court there specifically refused to consider the admissibility of any evidence sought to be produced in light of its ruling that the Board erred in revoking the subpoenas. 341 F.2d 367, 375, n. 14.

The alleged distinction, it is submitted, is one without significance and should not be used to avoid the application of otherwise controlling authority. Additionally, the instant case involved some 71 Board witnesses, many of which were alleged discriminatees with a definite interest in the outcome of the case. In such circumstances to require an offer of proof as to possible affidavits or

verbatim statements in the possession of the Board is an unreasonable expectation bordering on impossibility.

Without the Board employees' testimony regarding the procedures followed in interviewing potential witnesses, the care in storing any statements or memoranda, and the type of statements or memoranda which were actually in the possession of the Board, Respondents could never show that there would be unearthed hitherto undisclosed statements, and, accordingly, it would be impossible to tell whether any witnesses could be impeached, so naturally Respondents could never show that the Board would have reached other conclusions and made other findings.

5. **That the Respondents are not entitled to relief from the inherent prejudice they suffered by the erroneous refusal of the Trial Examiner to inspect the Filter memoranda and his erroneous revocation of subpoenas issued to Board employees unless Respondents perform the virtually impossible task of showing that:**

(A) The inspection of the Filter memoranda and the enforcement of the subpoenas would have actually unearthed hitherto undisclosed statements; *and*

(B) That the use of the statements for the purpose of cross examination would have successfully impeached the several witnesses involved; *and*

(C) The Board would have made different findings in light of the impeached testimony. (Opinion p. 10)

In adopting this three part test the Court has allowed the Board to persist in withholding evidence which the Court has determined should have been produced and

nevertheless obtain an order of enforcement, contrary to this Court's position in *General Engineering v. N.L.R.B.*, 341 F. 2d 367, 376 (9th Cir. 1965). Prior to the instant case the refusal to order production of documents "constituted error that could not have failed to prejudice" Respondents. *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403 (2d Cir. 1958). No prejudice is required to be shown when a Board attorney's relevant testimony is improperly excluded. *N.L.R.B. v. Capitol Fish,* 294 F.2d 868 (5th Cir. 1961). If the limitation of cross examination was to the Respondents "possible prejudice" the matter should be remanded for further hearing. *N.L.R.B. v. Blase,* 338 F.2d 327 (9th Cir. 1964).

In light of the fact that the attorney for the General Counsel was limiting his search to "signed" statements, the possibility of unearthing additional statements that are producible under the test properly set forth in the instant case is certainly more than remote; in fact, there is a substantial probability that many *documents were withheld that should have been produced.*

The second part of the Court's test requiring that Respondents show that several witnesses' testimony would have been successfully impeached, is quixotic at best. The rigors of trial and the uncertainty of results produced by proper cross examination render such a showing impossible. The emphasis placed upon certain points in an affidavit may differ from the emphasis placed on the same point during testimony, and such differences may or may not affect the Trial Examiner's opinion as to the credibility of the particular witness. *Cf., Tidelands Marine Service,* 126 N.L.R.B. 261 (1960). Omissions,

a different order of treatment, inconsistencies, refreshed memory or direct conflict between testimony and a pretrial statement could occur during cross examination as a result of the use of pretrial statements. Even if any or all of these results should occur with a particular witness, it would be impossible to say whether a witness was successfully impeached, since only the Trial Examiner can make the decision as to the credibility of a particular witness.

The last part of the test clearly renders the test void for lack of due process. "That the Board would or might have reached no different conclusion had the rejected evidence been received is entirely beside the point." *N.L.R.B. v. Burns,* 207 F.2d 434, 436 (8th Cir. 1953), quoting *Donnelly Garment Co. v. N.L.R.B.*, 123 F.2d 215, 224 (8th Cir. 1941). It is impossible to forecast the conclusions of the Board, but in any event the Board's "(f)indings cannot be said to have been fairly reached unless material evidence which might impeach as well as that which will support its findings is heard and weighed." *N.L.R.B. v. Indiana & Michigan Electrical Co.,* 318 U.S. 9 (1942). This Court should not allow the order to be enforced so long as there is a substantial likelihood that the witnesses of the Board were not fully and completely cross-examined.

6. **That the requested in camera inspection of memoranda by the Trial Examiner and the enforcement of subpoenas duces tecum were the equivalent to requesting answers to written interrogatories.**

A close analysis of this conclusion should cause the Court to reconsider. Pretrial discovery devices have re-

cently been encouraged by statute and Rules of Court to allow a more orderly presentation of evidence at the time of trial, to provide full and complete disclosure of relevant facts prior to trial, to encourage settlement, and to preserve early in the proceedings certain statements of witnesses when, presumably, the witnesses' memories are clearer than they would be at the time of trial, when the ravages of time may otherwise cloud precious memory.

On the other hand, the attempts by Respondents to obtain the pretrial statements of Board witnesses were designed to obtain the statements of witnesses that discovery-like processes previously created. It was an attempt to utilize statements produced prior to trial with the hope of presenting all of the facts in a manner which would allow the Trial Examiner to reach the most correct result. Certainly, if the credibility of certain of the witnesses could have been shaken by any pretrial statements in the possession of the Board, Respondents were entitled to use them for that purpose, as well as for the purpose of discovering other direct evidence that may have been disclosed in the pretrial statements.

II

CONCLUSION

It is respectfully urged that since the attorney for the General Counsel applied an inappropriate test in determining which statements he would disclose and since there is nothing on the record to explain the inability of the Board to produce certain statements that were supposed to be in its possession, and Respondents have never

been given an opportunity to properly cross-examine certain witnesses, or to examine Board employees with regard to the statements in its possession, or to meet the standards newly adopted by the Court, a rehearing should be granted to allow the Court to reconsider its Order.

Respectfully submitted,

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By CECIL E. RICKS, JR.

Attorneys for Respondent
BOAT OWNERS, and various named individuals

February, 1967

CERTIFICATE

I certify that, in connection with the preparation of this Petition for Rehearing, I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Petition is in full compliance with those Rules, and I further certify that this Petition is not filed for purposes of delay but in my opinion is meritorious.

Cecil E. Ricks, Jr.